

Illinois Veterans Home at Anna L.P. and American Federation of State, County and Municipal Employees, Council 31, AFL-CIO, Petitioner.
Case 14-RC-11691

June 6, 1997

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On September 25, 1996, the Regional Director issued a Decision and Order dismissing the election petition on the basis that the petitioned-for unit of registered nurses (RNs) consisted entirely of statutory supervisors. In accord with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review. The Employer filed an opposition. By Order dated November 5, 1996, the Board granted the Petitioner's request for review.

Having carefully considered the entire record in this case, including the Petitioner's request for review and the Employer's statement in opposition, the Board has decided to reverse the Regional Director's dismissal of the petition.

The Petitioner seeks a unit of all the Employer's RNs;¹ the Employer contends they are all statutory supervisors; and the Regional Director found that they exercise supervisory authority based on their roles in recommending discipline and in selecting and compelling employees to work overtime. Accordingly, the Regional Director dismissed the petition.

Contrary to the Regional Director, we find that the RNs' role in disciplining employees is merely reportorial and not indicative of supervisory status. The RNs use "Personnel Action" forms or written reports² to describe any incidents involving problems with employees. The RNs discuss such incidents with the employee or employees involved. The employee signs the form. The forms have room, but no designated space, for employee comment, and several of those introduced on the record contain employee comments. There is no space on the forms for the RNs' recommendations, and the evidence indicates that the RNs do not make any recommendations on whether or what discipline should be imposed. The RNs sign the forms and deliver them to the director of nursing (DON). The RNs do not consult with the DON or the administrator before filling out the forms.

The DON reviews the forms before placing them in the employees' personnel files. The DON also reviews

other reports in the file to decide if discipline is warranted. The record is clear that the DON is solely responsible for deciding what, if any, disciplinary action should be taken. The DON makes that decision based on the information in the employee's personnel file.³ The DON does not make an independent investigation, does not talk to the employee, and does not consult the RN. In deciding whether discipline is warranted, the DON does not follow any established system, such as a progressive disciplinary system, but decides the matter solely on her own judgment. Similarly, there is no evidence that any particular reported offense will necessarily lead to any particular discipline.

The Employer argues that the action forms are themselves a form of discipline, i.e., that they are warnings; that the forms initiate any disciplinary action; and, therefore, that the RNs effectively discipline employees. To the contrary, we believe the forms are merely reportorial. The RNs sign the forms and deliver them to the DON, who is solely responsible for making all decisions on discipline. Despite the printed word "warning" at the top of the forms, the purpose of the forms is to report incidents, not to impose discipline. The RNs do not recommend the imposition of discipline or what discipline should be imposed or make any recommendations at all. Section 2(11) requires an individual to use independent judgment in exercising the authority either to "discipline" or "effectively to recommend" discipline. The evidence here fails to show that the RNs either impose or recommend such discipline.

Instead, it is the DON, as acknowledged by our dissenting colleague, who decides whether the reported incident requires any disciplinary action on her part, and if so, what form that discipline should take. That decision, however, is not "based entirely on the information provided on the form" as stated by our colleague, because there is no established disciplinary system which sets forth prescribed discipline for a particular or multiple offenses. Rather, the DON's decision to impose discipline is based on her independent judgment in assessing the nature and frequency of the incident reports, as well as any other form in the employee's file such as absence/tardy forms and medication error reports. Accordingly, although the DON does not discuss the reported incident with either the employee or the RN, it is within the DON's sole discretion to decide what, if any, disciplinary action she should take based on the incident reports.

¹ The parties stipulated at the hearing that if the RNs are found not to be supervisors the unit should include the assistant director of nursing.

² The sole RN witness testified that she never used a form but, instead, wrote up incidents on blank sheets of typing paper.

³ In addition to the action forms, the DON looks at any absence/tardy forms or any medication error reports in the employee's file. Both such forms are signed by the RN on duty. An RN's signature on an absence/tardy report is merely a clerical function recording that the employee was tardy or absent. Medication error reports are rare but appear to be similar to incident reports.

For the foregoing reasons, we find that the RNs' role in reporting incidents is merely reportorial and is not indicative of supervisory status. *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Passavant Health Center*, 284 NLRB 887 (1987).⁴

Contrary to the Employer's contentions and the Regional Director's conclusion, we find that the RNs' limited role in assignment and direction of employees does not amount to statutory supervision. The DON prepares the certified nurses aides' (CNAs) basic assignments. The RNs have limited authority to move an assigned CNA from one hall to another, but generally CNAs are assigned to the halls where they previously had been working to provide continuity in care. The tasks performed by the CNAs are set by a worksheet setting forth the care plan for each resident.⁵ If any special tasks arise during a shift, such as a resident's development of a fever, the RN will direct whoever is available to perform the task. Such limited authority of the RNs to assign and direct employees does not require the use of independent judgment and is, therefore, not indicative of supervisory status.

In the event of a staff shortage on an RN's shift or for the next shift, the RN asks for volunteers to work overtime or, if necessary, uses a preexisting list to call employees at home to volunteer to come in. The DON testified that this happens about once or twice a week. If no volunteer can be found, the RNs have the authority to require an employee to work overtime. However, before RNs on their own would require an employee to work overtime, they would attempt to call the DON or the administrator. The only incident shown by the record in which an RN was unable to obtain a volunteer was one in which the RN was able to reach the DON, who decided the issue.

Contrary to the Regional Director, we find that the RNs' apparent authority to select, and if necessary, to require, employees to work overtime fails to show supervisory status. First, the RNs apparently are generally successful in finding volunteers either among the staff at work or from employees at home. And, in the event they cannot find volunteers, they call the DON or the administrator who makes the decision. It is only when these procedures are unavailing that an RN would find it necessary to require an employee to work overtime. Thus, the authority to require employees to

work overtime is limited, and there is no evidence that such authority is regularly exercised. Second, and more significantly, the decision on whether additional staff is needed does not require independent judgment, but is in the nature of a clerical task. Determining whether additional staff may be needed to meet established minimal staffing requirements is not much more complex than counting heads. An RN's compelling an employee to work overtime is not only an apparently infrequent event, but is similarly in the nature of a clerical function. It is merely recognition that a decision must be made to assure that minimal and necessary staffing requirements, as measured against an established standard, will be maintained and, as such, does not require the exercise of independent judgment or discretion.

The Employer additionally cites the RNs' roles in evaluations and in resolving grievances. Neither meets the requirements of the respective statutory indicia. The DON completes all employee evaluations. The RNs' role is limited to being consulted by the DON. The Employer fails to show the extent, if any, that the DON relies on the RNs' input from the consultations. The RNs' role in resolving grievances is limited to informally resolving minor disputes between employees or complaints by employees. There is no evidence that they perform any role in any formal grievance procedure.

For the above reasons, we find that the record fails to support the Regional Director's conclusion that the Employer's RNs are statutory supervisors. In addition, the record fails to show that the RNs exercise any Section 2(11) statutory indicia of supervisory status, and, thus, the Employer has failed to meet its burden of affirmatively showing supervisory authority. See, e.g., *Bennett Industries*, 313 NLRB 1363 (1994). Accordingly, we reverse the Regional Director's decision, reinstate the petition, and remand the case to the Regional Director for further processing.

MEMBER HIGGINS, dissenting.

Contrary to my colleagues, I find that the facts in this case fully support the Regional Director's conclusion that the Employer's registered nurses (RNs) are statutory supervisors, based on their authority to: recommend and impose discipline; assign employees; and resolve grievances.

As the Regional Director's analysis makes clear, the role of the RNs in disciplining employees represents more than the "merely reportorial" function found by the majority. The testimony shows that the RNs initiate all discipline among nursing personnel at the Employer's facility. The RNs, exercising discretion and independent judgment, identify inappropriate conduct, complete the "Personnel Action" form describing and categorizing the offense, and discuss the matter with the employee involved. The employee then signs the form

⁴ *Superior Bakery*, 294 NLRB 256, 261-262 (1989), cited by our dissenting colleague, is factually distinguishable in that the working foreman's authority extended beyond merely writing up employees. Thus, the foreman, on his own, suspended an employee and in addition, on his own, made decisions to recommend discipline, which upper level management followed (without any indication of an independent investigation) in the vast majority of cases.

⁵ Although the RNs prepare the worksheet for the next shift, this is a part of their professional responsibility in determining the treatment or care plans for the residents and is not indicative of supervisory status. *Ten Broeck Commons*, 320 NLRB at 811 fn. 10.

and may add written remarks.¹ Only after completing the form and counseling the employee does the RN involve the director of nursing (DON) in the matter, i.e., the RN forwards the form to the DON. Although the DON determines whether further discipline in the form of a suspension or termination is appropriate, she makes her decision based entirely on the information provided on the form, as well as any similar forms in the employee's file. The DON conducts no independent investigation.² Moreover, the form remains in the employee's file, so that, even if it does not immediately result in suspension or termination, it is considered if subsequent disciplinary incidents occur.

There is no showing in the record that the DON ever rejects the forms submitted by the RNs. Thus, to the extent that the DON suspends or terminates the employee on the basis of the form, the RN has made an effective recommendation of discipline. Under Section 2(11), the power to effectively recommend termination or suspension is expressly a supervisory one. When the DON declines to issue further discipline, the RN has issued a written warning, which itself constitutes discipline and which may be used as a basis for further discipline in the event of future misconduct. I find that the warnings here are administered at the sole discretion, and based on the independent judgment, of the RNs.

In sum, the RN can issue a warning which in itself constitutes discipline. And, the RN can effectively recommend other discipline.

With respect to the former, I note that *Superior Bakery*, 294 NLRB 256 (1989), supports my view. In that case, the Board adopted the judge's finding that working foreman Julian was a supervisor based, *inter alia*, on his authority to discipline employees. The judge stated, "It appears clear from the evidence that Julian had the authority to discipline other employees. In his role, Julian wrote out, signed, and issued written warnings to employees. In at least one case . . . Julian

issued the warning . . . without first consulting anyone higher in the chain of supervision." *Id.* at 262. The judge further found that although Julian's warnings had to be countersigned by admitted supervisors, the same policy applied to all warnings and Julian's recommendations concerning warnings were approved and signed 80 percent of the time.³ In the present case, the record indicates that the forms completed by the RNs are accepted 100 percent of the time and that, even when they are not used by the DON as the foundation for more severe discipline, they remain in the employee's file as written disciplinary warnings. Therefore, in my view, the RNs' authority in disciplining employees is an indicium of supervisory status.

I further find, in agreement with the Regional Director, that the RNs exercise supervisory authority in assigning and directing employees, based on their responsibility for calling employees in for work or requesting employees to stay past their shift, in the event of inadequate staffing. Contrary to my colleagues, I do not consider the RNs' authority less substantive because the employee is not required to come in or stay. Rather, I find that the RNs' authority to select a volunteer among the employees present, or to decide which employee on a list will be offered overtime work, demonstrates authority and the exercise of independent judgment. Furthermore, if there are no employees willing to work, the RN, in the absence of the DON, can require an employee to work.

Finally, the Regional Director found that RNs have the authority to resolve employee complaints. Although the RD did not specifically rely on this ground, it is clear that the authority to adjust such employee complaints, i.e., grievances, is an indicium of supervisory authority under Section 2(11) of the Act.⁴

³ Although, as the majority points out, there was also evidence that Julian had suspended one employee, the judge made no findings as to that evidence and did not emphasize the purported suspension in finding that Julian had disciplinary authority under Sec. 2(11). See also *Micronesian Telecommunications*, 273 NLRB 354, 359 (1984) (chief operator communications center found to possess disciplinary authority under Sec. 2(11) based on authority to issue oral and written warnings and oral reprimand).

⁴ It is clear that the term "grievances" in Sec. 2(11) is not confined to the grievance-arbitration provision of a collective-bargaining agreement. In this regard, I note that issues of supervisory status often arise in R cases, prior to the selection of a Sec. 9 representative.

¹ As described by the Regional Director, the RNs also complete other forms documenting medication errors and absence or tardiness. These forms are handled in the same manner as the personnel action form.

² My colleagues note that the DON, in making a decision, relies on several forms in the file. However, my colleagues ignore the fact that these forms are generated by the RN. My colleagues also note that the DON decides the *extent* of discipline. However, this does not controvert the fact that the RN effectively recommends that *some* discipline be imposed.